Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

In the Matter of the complaint of MARINE RECREATIONAL OPPORTUNITIES, INC., as owner of a 1987 CRUISERS, INC. 286 Rogue Sport for exoneration from or limitation of liability,

Petitioner,

—v.—

GERALD BERMAN and JOSEPHINA BERMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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31 pp

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Can the prior owner of a vessel maintain a proceeding for exoneration from or limitation of liability pursuant to 46 U.S.C. § 183 for acts it performed as the owner of that vessel which subsequently caused an injury to a third-party after its period of ownership had ceased?

PARTIES TO THE PROCEEDINGS BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND CORPORATE DISCLOSURE STATEMENT

Plaintiff-appellant:

Marine Recreational Opportunities, Inc. is a privately held corporation. It has no parent or subsidiary corporations that issue shares to the public.

Defendants-appellees:

Gerald Berman and Josefina Berman.

Defendants:

Zachery Berman;

Bennett Marine, Inc. is a privately held corporation with no parents or subsidiaries.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

In the matter of the complaint of Marine Recreational Opportunities Inc. as owner of a 1987 Cruisers Inc. 286 Rogue Sport for exoneration from or limitation of liability,

plaintiff-appellant,

—against—

Zachery Berman and Bennett Marine Inc., defendants

Gerald Berman and Josefina Berman, defendants-appellees

15 F. 3d 270 (2nd Cir. 1994) (1a).

In the matter of complaint of Marine Recreational Opportunities, Inc. as owner of a 1987 Cruisers Inc. 286 Rogue Sport for exoneration from or limitation of liability.

United States District Court, Southern District of New York, 92 Civ. 6476 (JFK), not reported, (7a).

JURISDICTION OF THIS COURT

Jurisdiction of this Court is sought on a *Writ of Certiorari* pursuant to 28 U.S.C. § 1254(1), seeking review of the United States Court of Appeals for the Second Circuit's January 31, 1994 decision affirming the United States District Court for the Southern District of New York's decision dismissing the plaintiff's complaint for lack of subject matter jurisdiction.

ORIGINAL JURISDICTION

Plaintiff, Marine Recreational Opportunities, Inc.'s complaint asserts a claim for exoneration from or limitation of liability under 46 U.S.C. §§ 183-188. Its complaint was filed pursuant to and in accordance with Fed. R. Civ. P. Supp. F. Jurisdiction in the United States District Court for the South-

ern District of New York was based upon the admiralty jurisdiction of the United States as set forth in 28 U.S.C. § 1333.

Jurisdiction in the United States Court of Appeals for the Second Circuit was predicated upon 28 U.S.C. § 1291, as an appeal from the final decision and order of Judge Keenan dated May 11, 1993.

STATUTES INVOLVED IN THE CASE

46 U.S.C. § 183 (set forth at 11a)

Fed. R. Civ. P. Supp. F. (set forth at 13a)

STATEMENT OF THE CASE

In 1991, Marine Recreational Opportunities Inc. ("MRO") purchased a used pleasure craft, a 1987 Cruiser's Inc. 286 Rogue Sport ("P/C Rogue Sport") at a public auction. It was not the manufacturer, wholesaler, resaler, or distributor of the P/C Rogue Sport to the general public. On May 31, 1991 MRO sold the P/C Rogue Sport to Zachery Berman for $41,000.00 and title and possession of the vessel was transferred from MRO to Zachery Berman on that date.

On June 2, 1991 Zachery Berman accompanied by his father Gerald Berman, Josefina Berman and others, took the P/C Rogue Sport out on the Long Island Sound. During the voyage, the boat hit a large wave or wake and Gerald Berman was allegedly thrown around the boat and seriously injured.

Gerald and Josefina Berman filed suit against MRO in New York State Supreme Court, Bronx County to recover damages for Gerald Berman's injuries. In their complaint, the Bermans' alleged *inter alia* that MRO sold Zachery Berman a vessel with defective trim tabs, was negligent in failing to inspect the trim tabs before delivery, was negligent in failing to warn the purchaser of "a known dangerous, defective and

hazardous condition" and was negligent in failing to train him in the proper operation of the vessel.

MRO then brought the instant action under 46 U.S.C. § 183 (1988) pursuant to Fed. R. Civ. P. Supp. F seeking exoneration from, or limitation of its liability for the injuries Gerald Berman allegedly suffered aboard P/C Rogue Sport that MRO had previously owned and sold to Zachery Berman.

Pursuant to the Bermans' motion, the district court dismissed MRO's action for lack of subject matter jurisdiction. MRO appealed this dismissal to the United States Court of Appeals for the Second Circuit. The Court of Appeals on January 31, 1994 affirmed the district court's dismissal, concluding that "MRO was not an 'owner' of the vessel within the meaning of § 183".

LEGAL ARGUMENT

MRO commenced this proceeding to exonerate itself from, or to limit its liability for acts it performed while owner of the P/C Rogue Sport that subsequently caused the accident and injuries allegedly sustained by plaintiffs Berman two days after its ownership of the vessel had terminated pursuant to 46 U.S.C. § 183(a), which provides in pertinent part:

> **The liability of the owner of any vessel, whether American or Foreign, . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.** (11a).

The Second Circuit's conclusion that the use of the term "owner" in § 183 is in the singular and does not suggest other persons in this chain of title (such as prior owners) is contrary

to the express language of the statute which clearly states "owners".

Section 183 was enacted to encourage investment in ships and shipping. *American Car & Foundery Co. v. Brassert*, 289 U.S. 261, 263, 53 S.Ct. 618, 619 77 L.Ed 1162 (1933).

To foster the purposes of the Limitation of Shipowners Liability Act, 46 U.S.C. §§ 181 to 188,

> **Courts have always construed the term "owner" in § 183 very broadly, in order to effectuate the Congressional intent. *Flink v. Paladini*, 279 U.S. 59, 489 S.Ct. 255, 73 L.Ed 614 (1929), *Standard Oil Co. of New Jersey v. Southern Pacific Co.*, 268 U.S. 146, 45 S.Ct 465, 69 L.Ed 890 (1925); *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 645 (9th Cir. 1961); *Austerberry v. United States*, 169 F.2d 583, 593 (6th Cir. 1948); *In re Trojan*, 167 F.Supp. 576 (N.D. Cal. 1958); *In re Petition of Colonial Trust Co.*, 124 F. Supp. 73 (D.Conn. 1954); *The Milwaukee*, 48 F.2d 842 (E.D. Wis. 1931). These cases have held such diverse parties and shareholders, mortgageses, prior vendors, life tenants, trustees and government agencies operating privately owned ships in wartime to be "owners" entitled to limit liability.**

In re Barracuda Tanker Corporation, 281 F. Supp. 228, 232 (S.D.N.Y.1968), *remanded on other grounds*, 409 F.2d 1013 (2d Cir. 1969).

As a general rule, one who is subjected to a shipowner's liability because of his exercise of dominion and control over a vessel should be able to limit his liability to that of an owner. *Dick v. The United States*, 671 F.2d 724, 727 (2d Cir. 1982); see also, *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 644-46 (9th Cir. 1961); *In re Petition of the United States*, 259 F.2d 608, 610 (3d Cir. 1958).

In determining whether a party is entitled to the benefits of the Limitation of Shipowners Liability Act, courts are cognizant that "the right to limitation, up until the present time remains broadly construed and extends to any person whose interest will make him a likely target of litigation". *In re Shell Oil Co.*, 780 F. Supp. 1086, 1092 (E.D. La. 1991).

MRO, while owner of the P/C Rogue Sport performed all of the necessary repairs and maintenance to the vessel. On May 31, 1991 it sold this vessel to Zachery Berman for $41,000.00. It is MRO's conduct in maintaining the vessel prior to the sale, and its conduct during the sales transaction that have made it the target of the Bermans' litigation. It is for these acts that MRO seeks the protection of the Limitation of Shipowners Liability Act, 46 U.S.C. § 183.

As the Second Circuit noted, "in most of the cases that purport to apply a broad interpretation of 'owner', the party seeking to limit liability had actual title or was capable of exercising some measure of control over the vessel at the time of the accident". *Marine Recreational Opportunities, Inc. v. Berman*, 15 F.3d 270 (2d Cir. 1994) (1a). In those reported cases, like most negligence actions against vessel owners, the conduct for which the owners sought limitation was performed during their period ownership, usually immediately prior to the accident; the accident occured while they owned the vessel; and they commenced their limitation proceeding prior to transfering ownership of the vessel.

From the research we have done, our adversary did, and both the District Court and the Second Circuit performed, it appears that in only one other case has a court reached and decided the issue: "may a person who at the time of the accident had neither legal, nor equitable title qualify as an owner if the accident; was proximately caused by such persons conduct at the time when he unquestionably was the owner and unquestionably had the right of limitation". *In re The Trojan*, 167 F. Supp. 576, 578 (N.D. Cal. 1958), *Aff'd sub nom, Todd*

Shipyards Corp. v. United States, 274 F.2d 402 (9th Cir. 1960).

In *The Trojan*, the United States sold the vessel to Sheffield Tankers Corporation on December 26, 1956. On January 29, 1957 while the Trojan was at Todd Shipyards, the vessel exploded causing extensive damage and injuring or killing 52 persons. Todd Shipyards commenced suit against the United States alleging that it made misrepresentations as to the nature of the fuel on board the vessel during the course of the sale to Sheffield and that this misrepresentation was the cause of the explosion. 167 F. Supp. at 577, 578. The United States then filed its petition to limit its liability pursuant to 46 U.S.C. §§ 183-188. Todd Shipyards moved to dismiss the petition of the United States. The district court found the United States as prior owner had standing to maintain its limitation of liability action. The Ninth Circuit affirmed the district court's decision, finding there were claims asserted that were clearly subject to limitation. 274 F. 2d at 402.

The Second Circuit's holding in this matter, that since MRO was not the owner of the vessel at the time of the accident and therefore cannot maintain a limitation of liability proceeding is in direct conflict with the Ninth Circuit's decision in *Todd Shipyards Corp. v. United States*, supra.

As the court in *The Trojan, supra*, correctly noted,

> **thus it is this court's opinion that in order to effectuate the purposes of the act, the motion to dismiss herein should be denied. To hold otherwise would subject a person to greater liability after a sale than existed before a sale. The weakness of such a holding appears when it is recalled that the alleged liability arose as a result of negligent conduct occurring before the sale and during ownership, at which time, limitation would clearly be have been available.**
> *id.* at 578.

In this case, just like it would have been in *The Trojan, supra*, if MRO is denied the protection of the Limitation of Shipowners Liability Act, it will be unjustly subjected to greater liability for acts it did while owner of the P/C Rogue Sport merely because its ownership interest in the vessel had ceased prior to the accident.

The rule which had emerged from all cases interpreting ownership pursuant to 46 U.S.C. § 183 has been that, if the plaintiff in limitation may be held liable because of his ownership or control of the vessel then he can maintain a limitation action. *In re Shell Oil Co., supra* at 1090; *In re Barracuda Tanker Corporation, supra* at 232

The rule now advanced by the court below creates a direct conflict between the Ninth Circuit and the Second Circuit over a material provision of the Limitation Act.

CONCLUSION

We respectfully submit that the Ninth Circuit's decision in *Todd Shipyards Corp. v. United States*, *supra*, permitting a prior owner to maintain a limitation of liability proceeding is both legally and logically correct, and that the decision of the Second Circuit in this matter to the contrary was in error, and must be reversed. Since MRO was the owner of the vessel at the time it performed the acts which the Bermans' assert were negligent, MRO as owner should be permitted to maintain its action to exonerate itself, or limit its liability for that conduct. MRO's petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

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